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The Maquiladoras and Hazardous Waste: The Effects under NAFTA

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The Maquiladoras and Hazardous Waste: The Effects Under NAFTA

TABLE OF CONTENTS

I. INTRODUCTION	255
II. BACKGROUND: A HISTORICAL PERSPECTIVE	256
A. <i>Impetus for the North American Free Trade Agreement</i>	256
B. <i>Mexico's Maquiladora Program</i>	257
C. <i>Past Cooperation on the Environment Between the United States and Mexico</i>	259
1. <i>Memorandum of Understanding</i>	259
2. <i>The La Paz Agreement</i>	259
3. <i>Annex III to the La Paz Agreement</i>	260
4. <i>The Integrated Environmental Plan for the Mexican-U.S. Border Area</i>	261
III. NORTH AMERICAN FREE TRADE AGREEMENT	262
A. <i>Structure of NAFTA</i>	262
1. <i>Tariff Provisions Under NAFTA</i>	262
2. <i>Standards-Related Measures Under NAFTA</i>	262
B. <i>Relation to the Basel Convention and Other Agreements</i>	263
IV. PROSPECTS FOR THE FUTURE MOVEMENT OF HAZARDOUS WASTE	265
A. <i>Basel Convention: Return of Hazardous Waste</i>	265
B. <i>Annex III to the La Paz Agreement: Return of Hazardous Waste</i>	266
C. <i>General International Law: Return of Hazardous Waste</i>	266
D. <i>Resource Conservation and Recovery Act (RCRA): Return of Hazardous Waste</i>	267
E. <i>NAFTA: Return of Hazardous Waste</i>	268
V. CONCLUSION	269

I. INTRODUCTION

On August 12, 1992, the United States, Mexico, and Canada announced the completion of negotiations for the North American Free Trade Agreement (NAFTA).¹ NAFTA represents an ambitious effort to eliminate barriers to trade for products and services on the North American continent.² Although providing an incentive for increased investment, NAFTA is the first comprehensive trade agreement by the U.S. to directly address and include provisions which protect and benefit the environment.³

1. President's Remarks Announcing the Completion of the North American Free Trade Agreement, 28 WEEKLY COMP. PRES. DOC. 1421 (Aug. 12, 1992) [hereinafter Press Release].

2. *Id.* at 1424.

3. *Id.*

Once ratified by the United States, Mexico, and Canada, NAFTA will gradually eliminate trade barriers barring the free flow of goods and investments.⁴ In light of formal ratification, it is likely that the elimination of tariffs will have a profound impact on future operations of U.S. companies conducting business under Mexico's maquiladora program.⁵ This Comment examines the impact that NAFTA will have on the transboundary movement of hazardous waste generated from manufacturing facilities operating in Mexico under the maquiladora program. Part II of this Comment addresses the historical relationship between the U.S. and Mexico, with an emphasis on recent economic trends and past environmental concerns.⁶ Part III examines the structure, scope, and aims of NAFTA, describing the applicable provisions which pertain to the movement and disposal of hazardous waste.⁷ In Part IV, this Comment explores the prospects for the future movements of hazardous waste resulting from the enactment of NAFTA.⁸ Finally, Part V evaluates possible future courses of action concerning the movement of hazardous waste between the U.S. and Mexico with respect to NAFTA.⁹

II. BACKGROUND: A HISTORICAL PERSPECTIVE

A. *Impetus for the North American Free Trade Agreement*

The decade of the 1980's witnessed significant increases for the U.S. in global trade and international investment.¹⁰ The U.S. was not the only country to enjoy this movement toward international investment.¹¹ Numerous other countries participated in and benefitted from increased foreign trade.¹² These worldwide changes during the last decade have spurred the U.S. and Mexico to take aggressive economic action.¹³ In response to the formation of regional trading blocks in other parts of the world, the U.S., Mexico, and Canada have joined together to create a trilateral trade agreement for the North American continent.¹⁴ The integration of the three North American economies under NAFTA will

4. Michael S. Feeley & Elizabeth Knier, *Environmental Considerations of the Emerging United States-Mexico Free Trade Agreement*, 2 DUKE J. COMP. & INT'L L. 259, 263 (1992).

5. See U.S. Environmental Protection Agency and Secretaria de Desarrollo Urbano y Ecologia, INTEGRATED ENVIRONMENTAL PLAN FOR THE MEXICAN-U.S. BORDER AREA, § II, at 8-9 (1992) [hereinafter BORDER PLAN] (describing that, in the past, the term "maquiladora," or mill, referred to grain grinding mills and the "maquila" was the mill owners' share of the flour received for grinding the grain); Additionally, the BORDER PLAN notes that, today, the term "maquiladora" refers to the export-oriented processing and assembly plants, commonly referred to as the in-bond industry, located in the Mexican border area that use imported inputs and materials. *Id.*

6. See *infra* notes 10-71 and accompanying text.

7. See *infra* notes 72-111 and accompanying text.

8. See *infra* notes 112-41 and accompanying text.

9. See *infra* notes 142-47 and accompanying text.

10. Press Release, *supra* note 1, at 1424. Since 1986, U.S. exports have increased by almost 90 percent. *Id.* In 1991, the U.S. exported over \$422 billion of agricultural and industrial products and \$164 billion in services. *Id.*

11. RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS 9-10 (1991).

12. *Id.*

13. Feeley & Knier, *supra* note 4, at 260.

14. Jesus Silva & Richard K. Dunn, *A Free Trade Agreement Between the United States and Mexico: The Right Choice?*, 27 SAN DIEGO L. REV. 937, 940 (1990).

create the most powerful economic trade zone in the world, with over 360 million people and an annual output in excess of 6 trillion dollars.¹⁵

The depth of the trade and economic interdependence between the U.S. and Mexico is neither new nor insignificant.¹⁶ While the U.S. is Mexico's largest trading partner, Mexico has become the third highest purchaser of U.S. products and the third highest supplier of American imports.¹⁷ In fact, trade between the U.S. and Mexico has almost doubled since 1986, reaching more than 58 billion dollars in 1990.¹⁸ In light of the global economic conditions and improved trade relations with Mexico, the U.S. participation in the North American Free Trade Agreement is both timely and opportune.

B. *Mexico's Maquiladora Program*

Faced with problematic levels of economic underdevelopment in northern Mexico, the federal government established the maquiladora industry in 1965 as a solution.¹⁹ The maquiladora program was principally designed to attract greater foreign investment by industry into Mexico.²⁰ Additional goals of the program included encouraging regional industrialization, generating employment, and attracting new technology for eventual integration into the Mexican industrial base.²¹

Under the program, maquiladora facilities are allowed to import into Mexico all raw materials used in manufacturing operations.²² In addition, these facilities may escape paying Mexican duties placed on imports into Mexico, provided that all finished products are exported and not sold in Mexico.²³ Additionally, finished products, imported to the U.S., are subject to a U.S. duty only on the value added by the foreign processing on the U.S. products processed or assembled in Mexico.²⁴

The majority of the maquiladora plants in Mexico are U.S. owned or controlled, either through foreign subsidiaries operating in the country or through subcontracts to U.S. corporations.²⁵ The goods assembled or manufactured in Mexico include a wide variety

15. Press Release, *supra* note 1, at 1424.

16. Silva & Dunn, *supra* note 14, at 942.

17. *Id.* at 942 n.18.

18. Karen Tumulty, *The Free Trade Dilemma: The Environmental Costs of a U.S.-Mexico Pact*, L.A. TIMES, Nov. 17, 1991, at A19.

19. Elizabeth C. Rose, Comment, *Transboundary Harm: Hazardous Waste Management Problems and Mexico's Maquiladoras*, 23 INT'L LAW. 223, 229 (1989).

20. *Id.*

21. Cheryl Schechter & David Brill, Jr., *Maquiladoras: Will the Program Continue?*, 23 ST. MARY'S L.J. 697, 700 (1992).

22. Rose, *supra* note 19, at 231.

23. Leonard P. Feldman, *U.S.-Mexico Free Trade Agreement*, 4 TRANSNAT'L LAW. 553, 565 (1991).

24. *Id.* See Tariff Schedule of the U.S. (TSUS) (1984) items 806.30 and 807.00 (describing that the effect of tariff item no. 806.30 limits the duty to the value of the foreign processing of articles of metal, with the exception of precious metals, "manufactured or subjected to a process of manufacture" in the United States and exported for processing and return to the United States for further processing). Harry A. Inman & Lic. Alejandro O. Tirado, *A Mexican Dividend: "Las Maquiladoras,"* 9 INT'L LAW. 431, 431 n.2 (1975). The effect of tariff item no. 807.00 is to limit the duty upon the full value of the imported products, less the value of the United States fabricated components contained therein, to imported items assembled in foreign countries with fabricated components that have been manufactured in the United States. *Id.*

25. Roberto A. Sanchez, *Health and Environmental Risks of the Maquiladora in Mexicali*, 30 NAT. RESOURCES J. 163, 164 (1990).

of products, such as plastic bags, toys, medical materials, sporting goods, auto parts, mechanical tools, furniture, and electric or electronic parts and equipment.²⁶

Since its inception three decades ago, the maquiladora industry has flourished, experiencing dynamic success, and becoming a formidable participant in the Mexican economy.²⁷ By 1991, there were 1871 maquiladora plants in existence throughout Mexico, employing well over four hundred thousand workers.²⁸

While the maquiladora industry has succeeded in attracting foreign investment to Mexico, maquiladoras have created a series of environmental problems.²⁹ One such problem receiving extraordinary attention is the generation of hazardous waste by the maquiladora plants.³⁰ Through improper storage or accidental spills, hazardous waste may seep through the soil and contaminate local groundwater supplies, causing serious environmental and public health ramifications on both sides of the border.³¹

Located in Mexico, maquiladora facilities are subject to the jurisdiction of the Secretaria de Desarrollo Social (SEDESOL), the Mexican counterpart to the U.S. Environmental Protection Agency (EPA).³² Under policies explicitly decreed by Mexico's General Law of Ecological Equilibrium and Environmental Protection³³ and hazardous waste regulations adopted by SEDESOL, the hazardous waste generated in Mexico by the maquiladora plants must be returned to the United States.³⁴ Under Annex III to the 1983 Binational Agreement, the U.S. is obligated to readmit any hazardous waste generated by these in-bond processing plants.³⁵ Once the waste crosses the international border into the U.S., the Resource Conservation and Recovery Act (RCRA) then regulates the conduct of those who generate and transport hazardous waste in the United States.³⁶

The 1983 Maquiladora Decree³⁷ establishes three methods, available to maquiladora facilities which generate hazardous waste, as an alternative to returning or exporting the waste back to its country of origin.³⁸ These disposal options include: (1) the destruction of waste with oversight by Mexican customs; (2) the donation to educational or non-profit

26. *Id.* at 166.

27. Schechter & Brill, *supra* note 21, at 699.

28. *Id.*

29. Sanchez, *supra* note 25, at 167.

30. *Id.*

31. U.S./MEXICO HAZARDOUS WASTE WORK GROUP, HAZARDOUS WASTE MANAGEMENT AND MAQUILADORA INDUSTRY MANUAL 49 (1992) [hereinafter MAQUILADORA MANUAL].

32. *Id.*

33. D.O. art. 55 (Jan. 28, 1988) (Mex.).

34. BORDER PLAN, *supra* note 5, § II, at 9. See Annex III to the United States and Mexico Border Environment Agreement, Regarding the Transboundary Shipments of Hazardous Wastes and Hazardous Substances, Nov. 12, 1986, U.S.-Mex., art. XI, T.I.A.S. No. 11,269 [hereinafter Annex III] (requiring the return of hazardous waste generated from materials admitted in-bond); *infra* notes 57-61 and accompanying text (providing a discussion of Annex III).

35. Annex III, *supra* note 34, art. XI. See Barbara Scramstad, Comment, *Transboundary Movement of Hazardous Waste from the United States to Mexico*, 4 TRANSNAT'L LAW. 253, 277 (1991) (discussing the amount of hazardous waste actually returned to the United States).

36. Scramstad, *supra* note 35, at 265.

37. Decree for the Development and Operation of the In-Bond Export Industry, D.O., Aug. 15, 1983, reprinted in MEXICAN FOREIGN TRADE INSTITUTE, MEXICO: ITS IN-BOND INDUSTRY, YOUR INVESTMENT OPPORTUNITY (1984).

38. MAQUILADORA MANUAL, *supra* note 31, at 53.

organizations;³⁹ and, (3) the nationalization⁴⁰ of such waste.⁴¹ However, in light of the supremacy of Mexico's General Law, both the destruction and donation alternatives conflict with the environmental mandates and powers entrusted to SEDESOL; and they therefore are no longer authorized.⁴²

C. *Past Cooperation on the Environment Between the United States and Mexico*

The past three decades have witnessed relations between the United States and Mexico advance towards new levels of cooperation and communication. NAFTA represents only the latest chapter in this ongoing binational relationship. In order to appreciate the significance of NAFTA, it is important to briefly describe earlier agreements between Mexico and the United States.

1. *Memorandum of Understanding*

Environmental cooperation between the United States and Mexico dates back well over a hundred years.⁴³ However, until 1978 there was no concerted effort by both countries to address contemporary concerns about the environment in the border region.⁴⁴ The 1978 Memorandum of Understanding (1978 MOU)⁴⁵ contemplated pollution abatement and control programs directed toward specific pollution problems affecting either or both countries along the border.⁴⁶

2. *The La Paz Agreement*

The ratification in 1983 of the La Paz Agreement,⁴⁷ established the framework necessary to address the environmental problems that have developed in the border area.⁴⁸

39. See Feeley & Knier, *supra* note 4, at 275 n.117 (commenting on Mexican law which allows for the "donation" of hazardous waste to charitable organizations, who sell such waste to recyclers).

40. Telephone interview with Richard Kiy, Special Assistant For U.S./Mexico Border Affairs, Office of International Activities, Environmental Protection Agency, Washington, D.C. (Feb. 16, 1993) "Nationalization" is the process by which a manufacturer pays the full amount of duties imposed on materials imported into Mexico. *Id.* Thereafter, such materials are treated as if they had never entered Mexico under the in-bond program. *Id.* Consequently, any hazardous waste generated from the manufacturing use of such materials is subject to the Mexico's regulatory authority and not subject to article XI of Annex III. *Id.*

41. MAQUILADORA MANUAL, *supra* note 31, at 53.

42. *Id.*

43. See Scramstad, *supra* note 35, at 259 (discussing the 1889 convention between the United States and Mexico to facilitate the principles contained in the Treaty of November 12, 1884).

44. 1978 Memorandum of Understanding Between the Subsecretariat for Environmental Improvement of Mexico and the Environmental Protection Agency of the United States for Cooperation on Environmental Programs and Transboundary Problems, June 19, 1978, U.S.-Mex., 30 U.S.T. 1574, T.I.A.S. 9264, ¶ 1 [hereinafter 1978 MOU].

45. *Id.*

46. Scramstad, *supra* note 35, at 261 (citing the 1978 MOU, *supra* note 44, ¶ 8).

47. Agreement Between the United States and Mexico on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, U.S.-Mex., T.I.A.S. 10,827, [hereinafter La Paz Agreement].

48. Scramstad, *supra* note 35, at 261-62 (citing Joseph Nalven, *Transboundary Environmental Problem Solving: Social Process, Cultural Perception*, 26 NAT. RESOURCES J. 793, 793 (1986)).

With its enactment, the La Paz Agreement superceded the 1978 MOU.⁴⁹ The Agreement officially recognized the importance of a healthy environment to the long-term economic and social well-being of each country.⁵⁰ To accomplish its objective, the agreement established a basis of cooperation which included: "coordination of national programs; scientific and educational exchanges; environmental monitoring; environmental impact assessment; and periodic exchanges of information and data on likely sources of pollution in their respective territory which may produce environmentally polluting incidents . . ."⁵¹ In other words, this agreement relies on increased communication and cooperation between the U.S. and Mexico in order to resolve the environmental dangers confronting the binational border.

3. *Annex III to the La Paz Agreement*

During the four years following the 1983 La Paz Agreement, the governments of the United States and Mexico entered into subsequent annexes to the agreement, each annex concentrating on a specific environmental problem confronting the border region.⁵² Realizing the potential risks associated with the improper handling of hazardous waste, Annex III was enacted in 1986 to specifically address the transboundary shipments of hazardous waste and hazardous substances.⁵³

Annex III defines hazardous waste as "any waste, designated or defined by the applicable designated authority pursuant to national policies, laws, or regulations, which if improperly dealt with in activities associated with them, may result in health or environmental damage."⁵⁴ Hazardous substances are likewise defined as any substance, including pesticides or chemicals, which "may produce harmful effects to public health, property or the environment, and is banned or severely restricted by the applicable designated authority."⁵⁵ The activities associated with hazardous waste or hazardous substances are "handling, transportation, treatment, recycling, storage, application, distribution, reuse or other utilization."⁵⁶

To protect both the public health and natural environment from the potential risks associated with hazardous waste and substances, Annex III implements procedures requiring notification to and the consent of the importing country before any hazardous waste or

49. La Paz Agreement, *supra* note 47, art. 23.

50. 1978 MOU, *supra* note 44.

51. *Id.* art. 6.

52. Scramstad, *supra* note 35, at 262. Annex I deals with sanitation problems at the border between San Diego, California and Tijuana, Baja California. Annex to the United States and Mexico Border Environment Agreement for Solution of Border Sanitation Problem at San Diego, California--Tijuana, Baja California, July 18, 1985, U.S.-Mex., T.I.A.S. No. 11,269. Annex II is an agreement which institutes a "United States-Mexico Joint Contingency Plan" regarding polluting incidents along the border resulting from discharges of hazardous substances. Annex II to the United States and Mexico Border Environment Agreement, Regarding Pollution of the Environment Along the Inland International Boundary by Discharges of Hazardous Substances, July 18, 1985, T.I.A.S. No. 11,269. Annex III addresses the transboundary shipments of hazardous waste and hazardous substances. Annex III, *supra* note 34. Annex IV addresses the transboundary air pollution caused by copper smelters along their common border. Annex IV to the United States and Mexico Border Environment Agreement, Regarding Transboundary Air Pollution Caused By Copper Smelters Along Their Common Border, Jan. 29, 1987, U.S.-Mex., T.I.A.S. No. 11,269.

53. Annex III, *supra* note 34.

54. *Id.* art. I, ¶ 2.

55. *Id.* art. I, ¶ 3.

56. *Id.* art. I, ¶ 4.

substances may be shipped.⁵⁷ Under the Agreement, each party is obligated to continue its enforcement of domestic laws and regulations regarding the transboundary shipments of hazardous waste and hazardous substances.⁵⁸ Annex III also compels the country of export to readmit any shipment of hazardous waste that the importing country chooses to return.⁵⁹ Additionally, hazardous waste generated from raw materials admitted in-bond⁶⁰ must be returned to its country of origin.⁶¹

4. *The Integrated Environmental Plan for the Mexican-U.S. Border Area*

In February 1992, the Presidents of the United States and Mexico jointly announced the implementation of the Integrated Environmental Plan for the Mexican-U.S. Border Area (Border Plan).⁶² The Border Plan is based on a fundamental belief that economic and environmental issues are intertwined: demonstrating that long-term economic growth is not possible without environmental protection and long-term environmental protection is not possible without economic growth.⁶³ Designed to complement NAFTA, the Border Plan concentrates on resolving the pollution problems in the border area.⁶⁴ The environmental program outlined in the Border Plan will continue whether or not a free trade agreement is successfully concluded.⁶⁵

Modeled after the La Paz Agreement, the Border Plan will be implemented in several phases scheduled over the next ten years.⁶⁶ The first stage (1992-1994) is characterized by an effort to identify the major environmental surroundings of the geographic area,⁶⁷ and the major environmental concerns confronting the area's livelihood.⁶⁸ The Border Plan also reviews the "cooperative environmental accomplishments . . . by binational, national, state, and local environmental agencies" in the border area.⁶⁹ Further, the Border Plan establishes a procedural scheme to mobilize the cooperative efforts of the public and private sectors in developing solutions to the environmental problems existing in the border area.⁷⁰ Finally, in order to make the Border Plan fully effective, the first stage recognizes a funding approach designed to achieve the plan's goals and objectives.⁷¹ With an understanding about the

57. Annex III, *supra* note 34, art. III, ¶ 1.

58. *Id.* art. II, ¶ 2.

59. *Id.* art. IV.

60. See *id.* art. XI (noting that raw materials admitted in-bond refers to "the processes of economic production, manufacturing, processing or repair, for which raw materials were utilized and temporarily admitted . . .").

61. *Id.*

62. Anne Alonzo & Edward M. Ranger, Jr., *The U.S.-Mexico Border Plan*, Bus. Mexico (BNA) (Apr. 1992) available in LEXIS, International Law Library, BNA File.

63. *Id.*

64. Feeley & Knier, *supra* note 4, at 264.

65. BORDER PLAN, *supra* note 5, at § I, at 5.

66. Feeley & Knier, *supra* note 4, at 264.

67. See BORDER PLAN, *supra* note 5, § II, at 1. "Border area" is defined as the area within 100 kilometers of each side of the international boundary. *Id.* (citing La Paz Agreement, *supra* note 47, art. IV(A)).

68. *Id.* at § I, at 3; Feeley & Knier, *supra* note 4, at 264.

69. BORDER PLAN, *supra* note 5, § I, at 3; Feeley & Knier, *supra* note 4, at 264.

70. BORDER PLAN, *supra* note 5, § I, at 3; Feeley & Knier, *supra* note 4, at 264.

71. BORDER PLAN, *supra* note 5, § I, at 3. Subsequent stages of the Border Plan are presently under review by the EPA and SEDESOL. *Id.*

historical relationship between the U.S. and Mexico as a basis, one must now examine the North American Free Trade Agreement.

III. NORTH AMERICAN FREE TRADE AGREEMENT

A. Structure of NAFTA

1. Tariff Provisions Under NAFTA

The principle objective of the North American Free Trade Agreement is the promotion of economic growth through expanded trade and investment opportunities.⁷² To foster such opportunities, NAFTA proposes the gradual elimination of barriers to the flow of goods and investments traveling among the U.S., Mexico, and Canada.⁷³ By eliminating such tariffs, NAFTA creates an expanded and secure market for the goods and services produced in the three North American countries.⁷⁴

Under NAFTA, the elimination of tariffs on originating goods⁷⁵ will take place over a period of fifteen years, culminating by January 1, 2008, in a free trade area covering most of the North American continent.⁷⁶ With all tariffs abolished, the goods of each party to the treaty will be accorded national treatment status.⁷⁷ In addition to this special trade status, NAFTA prohibits any party from increasing or adopting any customs duty⁷⁸ on an originating good.⁷⁹ Furthermore, parties to NAFTA may not adopt or maintain any restrictions limiting the importation of any good of another party or the exportation of any good destined for the territory of another party.⁸⁰

2. Standards-Related Measures Under NAFTA

Although NAFTA is principally a trade agreement, NAFTA recognizes that economic development should proceed in a manner consistent with environmental protection and conservation.⁸¹ In light of progressing in an environmentally sound manner, NAFTA places considerable importance on strengthening the development and enforcement of

72. Feeley & Krier, *supra* note 4, at 263.

73. *Id.*

74. North American Free Trade Agreement, Sept. 17, 1992, pmbl., available in WESTLAW, International Library, NAFTA File [hereinafter NAFTA]. NAFTA was signed by former President Bush on December 17, 1992, and is awaiting approval by the legislatures of all three contracting countries. [Ed.]

75. See *id.* art. 401 (defining originating goods as goods that originate in the territory of a party).

76. *Id.* annex 302.2, § 1. The exceptions to inclusion are indicated in annex 300-B. *Id.*

77. *Id.* art. 301, § 1. "National treatment shall mean . . . treatment no less favorable than the most favorable treatment accorded by a party to any like, competitive, or substitutable goods of that party." *Id.* art. 301, § 2.

78. See *id.*, art. 319, ¶ 3 (defining customs duty as any import duty or charge of any kind imposed in connection with the importation of a good, but not including any charge equivalent to an internal tax imposed on similar goods produced by the importing party).

79. NAFTA, *supra* note 74, art. 302, § 1.

80. *Id.* art. 309, § 1.

81. *Id.* pmbl.

environmental laws and regulations.⁸² NAFTA allows each party to maintain its environmental, health, and safety standards.⁸³

Under NAFTA, each party may adopt and maintain levels of protection that it considers appropriate which prohibit the importation of goods from another party, including protection relating to the environment.⁸⁴ However, a party adopting standards-related measures⁸⁵ should avoid arbitrary or unjustifiable distinctions between similar goods or services in the level of protection it considers appropriate.⁸⁶ NAFTA also limits a party's ability to adopt standards-related measures by prohibiting parties from adopting such measures which create an unnecessary obstacle⁸⁷ to trade between the parties.⁸⁸

Although parties may retain their own standards to protect the natural environment, NAFTA encourages "upward harmonization"⁸⁹ of national standards and regulations.⁹⁰ NAFTA achieves this harmonization by declaring that the parties shall work jointly to enhance the levels of safety and protection of the environment.⁹¹ However, this objective must be balanced against the provision which requires that to the greatest extent practicable, the parties shall make compatible⁹² their respective standards-related measures in order to facilitate trade in goods or services between the parties.⁹³

B. *Relation to the Basel Convention and Other Agreements*

Beyond allowing parties to adopt and maintain their respective standard-related measures, NAFTA also incorporates provisions from certain international environmental agreements,⁹⁴ including the Basel Convention⁹⁵ and the La Paz Agreement.⁹⁶ If specific

82. *Id.*

83. Press Release, *supra* note 1, at 1423.

84. NAFTA, *supra* note 74, art 904, § 1.

85. See *id.* art. 915, § 1, ¶ 12 (defining standard-related measure as a standard, technical regulation, or conformity assessment procedure).

86. *Id.* art. 907, § 3.

87. See *id.* art. 904, § 4 (noting that an unnecessary obstacle to trade is not created if the demonstrable purpose of such measure is to achieve a legitimate objective and such measure does not operate to exclude goods of another party that meet that legitimate objective). Under NAFTA a legitimate objective includes "an objective such as safety; protection of . . . the environment or consumers; or sustainable development, considering, among other things, where appropriate, fundamental climatic or other geographical factors, technological or infrastructural factors, or scientific justification but does not include the protection of domestic production." *Id.* art. 915, § 1, ¶ 7.

88. *Id.* art. 904, § 4.

89. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 305 (3d ed. 1991) (describing harmonization as a system that gradually induces nations toward uniform approaches to a variety of economic, health, or environmental regulations).

90. Press Release, *supra* note 1, at 1423.

91. NAFTA, *supra* note 74, art. 906, § 1.

92. See *id.* art. 915, § 1, ¶ 8 (defining the term make compatible as bringing different standards-related measures of the same scope approved by different standardizing bodies to a level such that they are either identical, equivalent, or have the effect of permitting goods or services to be used in place of one another or fulfill the same purpose).

93. *Id.* art. 906, § 2.

94. Malissa H. McKeith & Mary Hall, *Environmental Compromise: Striking the Balance Between Trade and Ecology*, 1992 Int'l Envtl. Rep. (BNA) 725 (Nov. 4, 1992). NAFTA specifically is subject to the Convention on the International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the Agreement between the Government of Canada and the Government of the United

trade obligations set forth in the Basel Convention or the La Paz Agreement conflict with NAFTA provisions, the former shall prevail to the extent of the inconsistency.⁹⁷ Therefore, if part of a regulation adopted by one party to NAFTA conflicts with the Basel Convention or the La Paz Agreement, that part in conflict is superseded by the international agreements. However, if the party has a choice among equally effective and reasonably available means of complying with such international agreements, the party must choose the alternative which is most consistent with other provisions of NAFTA.⁹⁸ NAFTA incorporates the provisions of the Basel Convention dealing with this issue.

The Basel Convention aspires to prevent the illegal transboundary movement of hazardous waste from developed nations to lesser developed countries.⁹⁹ This global convention on the transboundary movement of hazardous waste was signed into effect on March 22, 1989.¹⁰⁰ Although the U.S. ratified the Basel Convention after it went into force, Congress must enact implementing legislation before the U.S. officially adheres to the Convention.¹⁰¹

The Convention imposes several restrictions on the movement of hazardous waste between countries.¹⁰² Under the Basel Convention, parties must comply with the notice and consent provisions for transferring hazardous waste.¹⁰³ If a waste transaction occurs without proper notice and consent, the exporting state must either provide for environmentally sound disposal elsewhere or re-import the waste.¹⁰⁴

The Basel Convention requires that all hazardous waste transfers be managed in an environmentally sound manner.¹⁰⁵ The import or export of hazardous waste is prohibited when a party to the agreement reasonably believes that the transported waste will not be managed in an environmentally sound manner.¹⁰⁶ Additionally, the Basel Convention assists developing countries by providing waste management education and technology regarding hazardous waste transfers.¹⁰⁷

States of America Concerning the Transboundary Movement of Hazardous Waste, and the Agreement between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area (La Paz Agreement). *Id.*

95. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *adopted and opened for signature* Mar. 22, 1989, 28 I.L.M. 649, *reprinted in* UNITED NATIONS ENVIRONMENTAL PROGRAMME, *BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTE AND THEIR DISPOSAL: FINAL ACT* [hereinafter *Basel Convention*].

96. La Paz Agreement, *supra* note 47.

97. NAFTA, *supra* note 74, art. 104, § 1.

98. *Id.*

99. Scramstad, *supra* note 35, at 281.

100. Stephen Johnson, *The Basel Convention: The Shape of Things to Come for United States Waste Exports?*, 21 ENVTL. L. 299, 301 (1991).

101. *Senate Ratifies Basel Convention on Transboundary Shipments of Waste*, 23 Env't Rep. (BNA) 1255 (Aug. 21, 1992).

102. Johnson, *supra* note 100, at 301.

103. Basel Convention, *supra* note 95, art. VI.

104. *Id.*

105. Kathleen Howard, Comment, *The Basel Convention: Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, 14 HASTINGS INT'L & COMP. L. REV. 223, 229 (1990). Environmentally sound management of hazardous wastes is defined as "taking all practicable steps to ensure that hazardous wastes . . . are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes." Basel Convention, *supra* note 95.

106. *Id.*

107. Johnson, *supra* note 100, at 302.

Under the Basel Convention, waste is treated as hazardous waste if, among its characteristics, it includes any of the twenty-seven waste constituents commonly considered hazardous¹⁰⁸ and is characterized as explosive, flammable, spontaneously combustible, oxidizable, poisonous, infectious, corrosive, toxic, or ecotoxic.¹⁰⁹ Waste may also be classified as hazardous waste if the domestic legislation of the exporter, importer, or transit state deems it as such.¹¹⁰ However, certain types of hazardous waste are excluded from the scope of the Basel Convention, such as radioactive materials and waste discharged from ships in international waters.¹¹¹

IV. PROSPECTS FOR THE FUTURE MOVEMENT OF HAZARDOUS WASTE

For U.S. companies presently conducting business under the maquiladora program, the adoption of NAFTA will have a significant effect on their future operations.¹¹² Despite such impacts, American businesses with facilities located in Mexico will continue to manufacture products for consumption in the United States. Consequently, as manufacturing continues, these facilities will continue to generate hazardous waste. After NAFTA is ratified, the legal question becomes whether the U.S. may refuse to accept the return of any hazardous waste generated in Mexico by facilities that once operated under the maquiladora program.¹¹³

A. Basel Convention: Return of Hazardous Waste

In response to the increasing level of hazardous waste exports in recent years, the international community met under the auspices of the United Nations Environment Programme to author the Basel Convention.¹¹⁴ To minimize the international transport of hazardous waste, the Basel Convention provides for the regulation of hazardous waste exports through a system of stringent requirements and extensive monitoring procedures.¹¹⁵ One particular requirement prohibits the export of hazardous waste to countries that prohibit the import of such waste.¹¹⁶ In other words, a country may preclude the importation of hazardous waste into its territory by refusing to accept the shipment of waste. Therefore, in the absence of prior consent by the U.S., Mexico would be compelled to restrict any business from shipping its hazardous waste to the U.S. for treatment or final disposal. As a result, the Basel Convention does not obligate a particular country to accept

108. These hazardous constituents include: metal carbonyls, beryllium, hexavalent chromium, copper, zinc, arsenic, selenium, cadmium, antimony, tellurium, mercury, thallium, lead, inorganic fluorine, inorganic cyanides, acidic solutions, basic solutions, asbestos, organic phosphorous, organic cyanides, phenols, ethers, halogenated organic solvents, other organic solvents, congeners of polychlorinated dibenzo-furan or dibenzo-p-dioxin, and other organohalogen compounds. Howard, *supra* note 105, at 227 n.40.

109. Basel Convention, *supra* note 95, art. 1, ¶ 1(a) & annex III.

110. *Id.* art. 1, ¶ 1(b).

111. *Id.*

112. See *infra* notes 140-41 and accompanying text (discussing the potential impact of NAFTA on transboundary shipments of hazardous waste).

113. See *infra* notes 118-19 and accompanying text (describing the effect that NAFTA will have on the maquiladora program).

114. Howard, *supra* note 105, at 225.

115. *Id.*

116. Basel Convention, *supra* note 95.

the shipment of hazardous waste, it merely requires a country's prior consent before such waste may legally be transported across international boundaries.

B. Annex III to the La Paz Agreement: Return of Hazardous Waste

In the past, the maquiladora industry has benefitted from trade provisions allowing raw materials to be admitted in-bond and duty-free into Mexico. As a result, maquiladoras are exempted from Mexican duties placed on imports into Mexico and are subject to U.S. duties only on the value added by the foreign processing conducted in Mexico.¹¹⁷

Once the tariff barriers between the U.S. and Mexico have been eliminated under NAFTA, maquiladoras will lack the special status distinguishing them from other businesses operating in Mexico. Without the tariff exemption for materials admitted in-bond, both maquiladora and nonmaquiladora businesses operating in Mexico will enjoy the same benefits resulting from the special trading status between the U.S. and Mexico.

By eliminating the need to admit materials in-bond, NAFTA phases out the requirement imposed by Article XI of Annex III to the La Paz Agreement. This provision obligated the country originating materials used in-bond to readmit any hazardous waste generated from the manufacturing of those materials.¹¹⁸ In other words, there is no requirement placed on a country to accept the transport of hazardous waste, unless such waste is generated from the production use of materials admitted in-bond. Once in force, only countries not a party to NAFTA, with facilities utilizing materials admitted in-bond, will be eligible to receive special trade preferences from Mexico. Despite the presence of American manufacturers operating in Mexico, the U.S. is not legally obligated to accept the shipment of hazardous waste, unless it voluntarily consents to do so.¹¹⁹

C. General International Law: Return of Hazardous Waste

A possible ground, albeit highly controversial¹²⁰ and questionable, for requiring the repatriation of hazardous waste generated by American manufacturers operating in Mexico is the international law doctrine of *jus cogens*.¹²¹ Under Article 53 of the Vienna Convention,¹²² such peremptory norms consist of two elements.¹²³ First, *jus cogens* are norms which are accepted and recognized by the international community of states as being

117. Feldman, *supra* note 23, at 565. See *supra* notes 22-24 and accompanying text (describing the tariff arrangement between the United States and Mexico regarding the maquiladora industry).

118. Annex III, *supra* note 34, art. XI.

119. See *supra* notes 57-61 and accompanying text (describing the requirement for consensual approval before waste may legally be shipped across international borders).

120. IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 203 (2d ed. 1984) (describing the controversial use of *jus cogens*).

121. JERZY SZTUCKI, *JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: A CRITICAL APPRAISAL* 6 (1974). The concept of *jus cogens*, as it was conceived of in the Vienna Convention on the Law of Treaties, means the same as "peremptory norms of general international law." *Id.* at 103. Sztucki asserts that *jus cogens* operates to void contracts for any variance or departure from the contracting parties' essential norms. *Id.* at 6.

122. Vienna Convention on the Law of Treaties, May 23, 1969, ATS 1974, No.2 [hereinafter Vienna Convention].

123. SZTUCKI, *supra* note 121, at 97.

of superior status.¹²⁴ Second, *jus cogens* are norms from which no derogation by treaties is permitted.¹²⁵ *Jus cogens* have the effect of invalidating any treaty conflicting with them.¹²⁶ In other words, *jus cogens* are norms from which no derogation is permitted, unless modified by a subsequent norm of general international law having the same character.¹²⁷ Examples of recognized norms include prohibitions on acts of aggression, genocide, and slavery.¹²⁸

Under this theory, should Mexico satisfy the high threshold associated with invalidating treaties under the Vienna Convention, the U.S. would be obligated to accept the return of any hazardous waste generated from materials admitted in-bond. Waste generated by the production of non-in-bond materials would require the consent of the U.S. before the waste could be legally shipped. To succeed in this endeavor, Mexico must first establish that the international community recognizes a particular peremptory norm regarding disposal of foreign hazardous waste without the foreign country's consent. Mexico then must establish that the intent of NAFTA is inconsistent with this peremptory norm.

Mexico's rationale for pursuing this theory is based on the concept of consent. Mexico initially granted its consent in 1965 to allow American businesses to operate in a limited capacity in Mexico, provided that all hazardous waste generated would be returned to the United States. However, after NAFTA, Mexico faces the prospect that it can no longer return to the U.S. any hazardous waste generated by American facilities operating in Mexico. As a result of NAFTA, Mexico will inherit problems associated with hazardous waste treatment and disposal - problems to which Mexico did not consent to in 1965, nor plans on accommodating in 1993.

However, the use of *jus cogens* is highly questionable since Mexico may have forfeited its right to invoke *jus cogens* for invalidating the operation of NAFTA. Under Article 45 of the Vienna Convention, a waiver may result from express or implied conduct.¹²⁹ By signing and ratifying NAFTA, Mexico has impliedly consented to any benefits or burdens that may result as a consequence of NAFTA. Additionally, since the use of *jus cogens*, if successful, would invalidate NAFTA, Mexico would likely disfavor this approach after actively negotiating with the U.S. and Canada for the North American Free Trade Agreement.

D. *Resource Conservation and Recovery Act (RCRA): Return of Hazardous Waste*

In response to growing concern over the disposal of hazardous waste, Congress enacted the Resource Conservation and Recovery Act (RCRA) in 1976.¹³⁰ RCRA governs the conduct of individuals who generate or transport hazardous waste inside the United States.¹³¹ As waste exports increased, RCRA was amended in 1984 to address

124. *Id.* See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 331 cmt. e (1987).

125. SZTUCKI, *supra* note 121, at 97.

126. *Id.*

127. Vienna Convention, *supra* note 122, art. 53.

128. Barcelona Traction Case, 1970 I.C.J. 3, 33 (1970).

129. Vienna Convention, *supra* note 122, art. 45.

130. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq. (1982).

131. Scramstad, *supra* note 35, at 265.

international shipments of hazardous waste.¹³² Consequently, hazardous waste exports from the U.S. are prohibited unless the exporter complies with both notification and consent requirements.¹³³ However, when an international agreement exists between the U.S. and the receiving country, RCRA requires that the shipment conform with the terms of the Agreement.¹³⁴ For shipments of hazardous waste between the U.S. and Mexico, the provisions of Annex III to the La Paz Agreement are controlling.

Annex III addresses the transborder shipments of hazardous waste between the U.S. and Mexico.¹³⁵ Only hazardous waste generated from materials admitted in-bond are required by Annex III to be returned to the country originating such materials.¹³⁶ For hazardous waste shipments other than waste generated by the in-bond industry, Annex III requires the consent of the importing country before such waste may legally be shipped.¹³⁷ Therefore, by not consenting, the U.S. may preclude any shipment of hazardous waste generated in Mexico from entering its territory. Further, American manufacturers operating outside the in-bond industry must comply with Mexico's regulatory scheme, which applies to businesses of Mexican ownership operating in Mexico.¹³⁸

Taking a contrary position, Mexico can argue that RCRA applies extraterritorially to U.S. businesses operating in Mexico. Under this theory, any hazardous waste generated by an American manufacturer must conform to RCRA's requirements regulating the transportation and disposal of hazardous waste. However, in 1991, a Federal District Court in New York held that RCRA does not extend to waste located within the territory of another sovereign nation.¹³⁹ Because RCRA's jurisdiction is limited to the U.S., the U.S. is not under a statutory obligation to accept any hazardous waste generated by American businesses located in Mexico. As a result, the operations of American companies in Mexico are subject to Mexico's regulatory authority.

E. NAFTA: Return of Hazardous Waste

Although touted as a trade agreement protective of the environment, NAFTA itself is silent on the subject of hazardous waste. Despite the absence of specific references, NAFTA incorporates two collateral agreements, both of which contain provisions directly related to the transboundary movement of hazardous waste. Both the Basel Convention and the La Paz Agreement include provisions requiring the consent of the importing country before any waste may legally be shipped.¹⁴⁰ By incorporating these international agreements, NAFTA implicitly acknowledges the regulatory schemes established by them. As a result, the

132. Julianne I. Adler, *United States' Waste Export Control Program: Burying Our Neighbors in Garbage*, 40 AM. U. L. REV. 885, 894-95 (1991).

133. RCRA, 42 U.S.C. § 6938(a), (c) (Supp. 1992).

134. *Id.* § 6938(f) (Supp. 1992).

135. Annex III, *supra* note 34, pmbl.

136. *Id.* art. XI.

137. *Id.* art. III, § 1.

138. A detailed review of Mexico's regulatory scheme is beyond the scope of this Comment.

139. See *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 672-74 (S.D.N.Y. 1991) (stating that plaintiffs failed to demonstrate that Congress intended RCRA to apply outside the territorial jurisdiction of the United States); *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) (declaring that under a canon of statutory construction, legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States).

140. See *supra* notes 57-61 and 102-06 and accompanying text (discussing the prerequisite of consent prior to shipment of hazardous waste across international borders).

drafters of NAFTA may have intended the Basel Convention and the La Paz Agreement to control this aspect of hazardous waste shipments. Therefore, before any shipments of waste may be exported, the importing country must consent to accept the hazardous waste. However, as originally enacted, consent is not required for shipments of waste generated from materials admitted in-bond, since Annex III to the La Paz Agreement obligates the country originating such materials to accept the waste's return.¹⁴¹

V. CONCLUSION

In light of the technological advancements in the field of waste treatment over the past several years, a new industry has developed around the treatment of hazardous waste. For its livelihood, this industry relies specifically on hazardous waste, the essential product needed for its service. Although presently considered a byproduct, hazardous waste may soon be characterized as goods of commerce.

Once NAFTA enters into force, hazardous waste-related businesses, like other goods and service producers, will benefit from the gradual elimination of trade barriers. Despite an increasing demand for hazardous waste, such waste continues to pose a serious threat to the natural surroundings. Without adequate methods of treatment, Mexico may require that all hazardous waste generated by American facilities in Mexico be returned to the United States. Although the U.S. must address the problems associated with domestically generated waste, it may choose, for whatever reasons, to preclude the importation of hazardous waste from Mexico.

The drafters of NAFTA clearly recognized the need for parties to have the ability to adopt and maintain restrictions necessary to protect the health of a country's citizens and the well-being of a country's natural environment.¹⁴² Since hazardous waste poses dangers both to human health and the environment, the U.S. would be entitled to adopt measures in order to prevent such waste from entering its territory. However, these measures may not act as an unnecessary obstacle to trade between the parties.¹⁴³ The threshold for ascertaining whether a measure acts as an unnecessary obstacle is determined by the measure's demonstrable purpose.¹⁴⁴

The United States can enact a measure which restricts the importation of hazardous waste if it has a legitimate objective. Measures which are intended to protect citizens and the environment are considered legitimate. Despite this legitimate objective, however, a restriction will be held invalid if it excludes goods of another party that comply with this restriction.¹⁴⁵ Therefore, waste from Mexico could enter the U.S. as long as such waste satisfies the adopted regulations. As a result, it would ordinarily appear that any standard-related measures adopted by the U.S., which preclude the import of hazardous waste from Mexico, would be held invalid if the measures discriminated solely on the origin of the waste. Nevertheless, one must consider the international agreements recognized by NAFTA.

141. Annex III, *supra* note 34, art. XI.

142. NAFTA, *supra* note 74, art. 904, § 1.

143. *Id.* art. 904, § 4. See Jima Ikegawa, Comment, *North American Free Trade Agreement: How Will It Affect U.S. Environmental Regulations?*, 6 TRANSNAT'L LAW. 225, 233 (1993) (arguing that U.S. environmental regulations, despite constituting legitimate objectives under NAFTA, may still be attacked under NAFTA as impermissible trade barriers or restraints on trade).

144. NAFTA, *supra* note 74, art. 904, § 4.

145. *Id.*

Under both the Basel Convention and the La Paz Agreement, only the consent of an importing country is required before hazardous waste may legally be shipped across international boundaries.¹⁴⁶

Under NAFTA, the provisions of the Basel Convention and the La Paz Agreement are not prejudiced by the trade obligations imposed by NAFTA. As a result, when inconsistencies exist between NAFTA and either of the above international agreements, NAFTA provides that the provisions of the Basel Convention and the La Paz Agreement shall control.¹⁴⁷ Under both international agreements, mere lack of consent by a country is sufficient to prevent waste from entering that country. By comparison, NAFTA requires both that there be a lack of consent and that it be supported by a legitimate objective. In other words, an inconsistency is created when either international agreement is applicable and, according to the Basel Convention and the La Paz Agreement, the U.S. may merely withhold its consent and thereby preclude hazardous waste generated in Mexico from crossing into the United States.

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146. *Supra* notes 57, 103.

147. NAFTA, *supra* note 74, art. 104, § 1. *See supra* notes 94-111 and accompanying text (discussing the interaction between NAFTA and other agreements).